

NOV 14 1961

JOHN F. DAVIS, CLERK

Supreme Court of the United States.

No. ~~523~~
41

OCTOBER TERM, 1961

LENORE FOMAN,
Petitioner,

v.

ELVIRA A. DAVIS, EXECUTRIX,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

MILTON BORDWIN,
Attorney for Petitioner.

50 Congress Street,
Boston, Massachusetts,
November 10, 1961.

Table of Contents.

Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and rules involved	3
Statement of the case	3
Reasons for granting the writ	6
Summary of argument	7
Argument	7
Conclusion	26
Appendix A	27
Statutes and Rules involved	27
Federal Rules of Civil Procedure	28
Appendix B	30
Opinion of the Court of Appeals	30
Opinion of the Court of Appeals on Petition for Rehearing	33
Appendix C	36
First notice of appeal	36
Second notice of appeal	36
Appendix D	37
Statement of points to be relied upon by the plaintiff-appellant, Lenore Foman	37

Table of Authorities Cited.

CASES.

Astorian, The, 57 F. 2d 85	11
Atlantic Coast Line R. Co. v. Mims, 199 F. 2d 582	16

Blake v. Clyde Porcelain Steel Corp., 7 F.R.D. 768	25
Blunt v. United States, 244 F. 2d 355	11, 17
Burdix v. United States, 231 F. 2d 893	11, 17
Cheney v. Moler, 285 F. 2d 116	15n
Cleaves v. Kenney, 63 F. 2d 682	3, 4, 26
Conley v. Gibson, 355 U.S. 41	7, 8, 9, 11, 24
Conway v. Pennsylvania Greyhound Lines, Inc., 243 F. 2d 39	15n
Creedon v. Loring, 249 F. 2d 714	14, 15
Cremidas, In re Estate of, 14 F.R.D. 15	9
Crump v. Hill, 104 F. 2d 36	11, 16, 17
Cutting v. Bullerdick, 178 F. 2d 774	18
Donovan v. Esso Shipping Co., 259 F. 2d 65	15n
Dowdy v. Procter & Gamble Mfg. Co., 267 F. 2d 827	24
Dunn v. J. P. Stevens & Co., Inc., 192 F. 2d 854	8n, 11, 24
Fraser v. Doing, 130 F. 2d 617	11
Friederichsen v. Renard, 247 U.S. 207	20, 21, 22
Gunther v. E. I. DuPont DeNemours & Co., 255 F. 2d 710	15n
Hadden v. Rumsey Products, Inc., 196 F. 2d 92	10n, 11n
Hoiness v. United States, 335 U.S. 297	13, 14n, 15
Holz v. Smullon, 277 F. 2d 58	15n
Hutches v. Renfro, 200 F. 2d 337	22
Jordan v. United States District Court, 233 F. 2d 362	11, 17
Nolan v. Bailey, 254 F. 2d 638	14
Norris v. School District in Windsor, 12 Me. 293	23

TABLE OF AUTHORITIES CITED

iii

Parker v. Macomber, 17 R.I. 674, 24 Atl. 464, 16 L.R.A. 858	23
Peterson Steels, Inc., v. Seidmon, 188 F. 2d 193	24
Pioche Mines Consol., Inc., v. Fidelity-Philadelphia Trust Co., 206 F. 2d 336	24
Railway Express Agency, Inc., v. Epperson, 240 F. 2d 189	14
Roth v. Bird, 239 F. 2d 257	11, 17
Sebastiano v. United States, 103 F. Supp. 278, aff'd, 195 F. 2d 184	9
Shopneck v. Rosenbloom, 326 Mass. 81	23
Southern States Equipment Corp. v. USCO Power Equipment Corp., 209 F. 2d 111	9, 10
State Farm Mutual Automobile Insurance Co. v. Palmer, 350 U.S. 944	13, 14
Sun-Lite Awning Corp. v. E. J. Conklin Aviation Corp., 176 F. 2d 344	16
Tarkington v. United States Lines Co., 222 F. 2d 358	9n
Trivette v. N.Y.L.I.C., 270 F. 2d 198	15n
United States v. Arizona, 346 U.S. 907	13, 14
United States v. Backofen, 176 F. 2d 263	9
United States v. Best, 212 F. 2d 743	15
United States v. Ellicott, 223 U.S. 524	13
United States v. Memphis Cotton Oil Co., 288 U.S. 62	22, 25
United States v. Stromberg, 227 F. 2d 903	15n, 16
United States v. Wissahickon Tool Works, Inc., 200 F. 2d 936	9

STATUTES, ETC.

28 U.S.C.

§ 41(1)	3
§ 777 (repealed)	3, 14 _n
§ 1254(1)	2
§ 1291	3
§ 2111	3, 8, 14 _n

28 U.S.C.A., Rule 61, Notes of Advisory Committee on Rules

14_n

Federal Rules of Civil Procedure

Rule 1	3, 8, 12
Rule 4	10 _n
Rule 7(b)	8 _n
Rule 8(f)	3, 8, 12
Rule 12(c)	11
Rule 15(a)	3, 24, 25
Rule 15(e)	3
Rule 52(b)	16
Rule 54(c)	3, 22
Rule 56(b)	11
Rule 59	5, 8, 9 _n , 12
Rule 59(a)	16
Rule 59(e)	2, 3, 5, 7
Rule 60	8, 9, 10, 12
Rule 60(a)	10
Rule 60(b)	2, 3, 5, 7, 8, 9, 10 _n , 12
Rule 61	3, 8, 12, 14 _n

TABLE OF AUTHORITIES CITED

v

Rule 73	16
Rule 73(a)	5
Rule 73(b)	2, 3

Rules of the United States Court of Appeals for the First Circuit, Rule 24(2)	4
--	---

TEXTBOOKS, ETC.

1 Chitty on Pleading 353* (16th Am. ed. 1876)	23
7 Moore, Federal Practice, ¶ 60.18 [8], p. 215 (2d ed. 1955), text at nn. 5-6	8n
H. Rep. No. 308, 8th Cong., 1st Sess., p. A 239	14n

Supreme Court of the United States.

OCTOBER TERM, 1961.

LENORE FOMAN,

Petitioner,

v.

ELVIRA A. DAVIS,*EXECUTRIX,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner, Lenore Foman, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on June 26, 1961 (rehearing denied, August 17, 1961).

Opinions Below.

The memorandum opinion of the district court is unreported and is printed in the Record Appendix at p. 7. The first opinion of the Court of Appeals is reported in 292 F. 2d 85, and is printed in Appendix B hereto, *infra*, p. 30; the opinion denying rehearing is unreported to the date of the printing of this Petition, but is printed in Appendix B hereto, *infra*, p. 33.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 26, 1961 (R.A. 15).¹ A timely petition for rehearing was filed on July 7, 1961 (R.A. 19), and denied on August 17, 1961 (R.A. 21). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.²

1. Is a notice of appeal which is filed during the pendency of a Rule 59(e) motion to vacate judgment a nullity, or should it be given effect once the motion is denied?

2. When a motion to vacate judgment does not designate under which of two possible rules it is made—59(e) or 60(b)—is it properly held to have been made under that rule which results in denying plaintiff a disposition on the merits rather than the one which would permit such a disposition?

3. Is a notice of appeal which refers to the denial of a post-judgment, non-appealable order sufficient, under Rule 73(b), to raise the original judgment on appeal?

4. Where a complaint is drawn in accordance with an unreversed decision of the United States Court of Appeals for the First Circuit, does a district judge in that Circuit, after refusing to adhere to the decision and dismissing the complaint for failure to state a claim, abuse his discretion by denying a motion to amend the complaint?

¹ References to "R.A." refer to the Record Appendix to Brief for Appellant filed in the court below by petitioner, copies of which are filed herewith. References to "App." refer to the appendices to this Petition.

² Unless otherwise noted, all references to "rule" or "rules" refer to the Federal Rules of Civil Procedure, 28 U.S.C.

Statutes and Rules Involved.

The statutory provisions involved are 28 U.S.C. §§ 777 (repealed), 1291, 2111, and the following numbered rules of the Federal Rules of Civil Procedure, 28 U.S.C.: Rules 1; 8(f); 15(a); 15(e); 54(c); 59(e); 60(b); 61; and 73(b).

These statutes and rules are printed in Appendix A hereto.

Statement of the Case.

On June 14, 1960, petitioner, a citizen of the State of New York, filed her complaint in this action against the respondent, a citizen of the Commonwealth of Massachusetts, as executrix under the will of Wilbur W. Davis. Petitioner alleged in her complaint that the matter in controversy exceeded the sum of ten thousand dollars, exclusive of interest and costs, jurisdiction in the district court being based upon diversity of citizenship under 28 U.S.C. § 41(1).

In her complaint (R.A. 2) petitioner alleged in a single count an oral agreement with her father, the decedent, Wilbur W. Davis, whereby the petitioner agreed to care for her mother, decedent's first wife, and to pay all expenses for her care and maintenance for as long as she lived. The complaint further alleged that the decedent, in turn, agreed to make and leave no will, to the end that the petitioner, as his only child, would take that portion of his estate to which she would be entitled under the intestacy laws of Massachusetts.

In setting forth her cause of action in a single count based upon the oral agreement, petitioner relied upon *Cleaves v. Kenney*, 63 F. 2d 682 (1st Cir. 1933) (R.A. 7-8; Brief for Appellee, pp. 6, ff.; Brief for Appellant, pp. 3, ff.), which held that an oral agreement to destroy a will

and codicil and die intestate did not fall under the Massachusetts statute of frauds.

Petitioner further alleged that she fully performed her part of the agreement: that subsequent to the death of decedent's first wife he married the respondent; and that thereafter he made a will which, except for a \$5,000 legacy to a brother, devised and bequeathed his entire estate to the respondent. Petitioner, by this action, sought to recover that portion of the decedent's estate which she would have received if the decedent had neither made nor left a will as allegedly agreed.

On August 11, 1960, respondent filed her answer and motion to dismiss the complaint on the ground that it failed to state a claim for which relief could be granted. By memorandum of decision dated December 16, 1960, the district judge allowed the motion (R.A. 7-9), declining to follow the holding in *Cleaves v. Kenney, supra*; and judgment dismissing the complaint was entered December 19, 1961 (R.A. 10).

On December 20, 1960, petitioner filed motions to vacate the judgment of dismissal and to amend her complaint (R.A. 10, 11). While these motions were pending before the district judge, the petitioner, apprehensive lest the time allowed for an appeal should expire, filed a notice of appeal on January 17, 1961, from the judgment of dismissal entered on December 19, 1960. On January 23, 1961, the district judge denied petitioner's motions to vacate judgment and for leave to amend and on January 26, 1961, petitioner filed a second notice of appeal from the order denying these motions. (The two notices of appeal are printed in Appendix C hereto, *infra*, p. 36.)

Upon motion by petitioner, assented to by respondent, the Court of Appeals on February 24, 1961, ordered the two appeals consolidated. Subsequently, in compliance with Rule 24(2) of the Rules of the United States Court

of Appeals for the First Circuit, petitioner furnished to the Court and the respondent "a statement of points" upon which she intended to rely on appeal. (This Statement is set out as Appendix D hereto, *infra*, p. 37.)

In due course petitioner and respondent filed briefs on appeal with the Court of Appeals, in which were argued the issues whether the Massachusetts statute of frauds constituted a bar to the action and whether the district judge had committed reversible error in denying petitioner's motions to vacate the judgment of dismissal and to amend her complaint. In addition, respondent argued that, after the first notice of appeal was filed, the district court was deprived of jurisdiction over the case. *Neither* party, however, argued the issue of the jurisdiction of the Court of Appeals, which was first raised by that Court, *sua sponte*, at the oral argument on appeal.

By its opinion dated June 26, 1961 (App. B, p. 30), the Court of Appeals ordered judgment dismissing the appeal from the judgment of the district court and affirming the district court's order of January 26, 1961, which denied petitioner's motions to vacate judgment and to amend her complaint. The Court held:

First—Although the motion to vacate judgment could have been filed under either Rule 59(e) or Rule 60(b), in the absence of a designation by the movant "the full context of the rules dictates that resort should be made to the procedure under Rule 59 if time for applying for such motions has not expired."

Second—Since a motion under Rule 59 terminates the running of time for taking an appeal (Rule 73(a)), the notice of appeal filed on January 17, 1960, during the pendency of the motion to vacate, was premature and, presumably, of no effect.

Third—The second notice of appeal, referring only to the order denying the motions to vacate and to amend and

not to the original judgment, must therefore, with respect to such judgment, be dismissed.

On July 7, 1961, petitioner filed a timely petition for rehearing with the Court of Appeals in which she argued that the second notice of appeal should be treated as appealing from the judgment rather than the unappealable order denying the post-judgment motions. Furthermore, petitioner argued, the ruling of the Court of Appeals was in violation of the basic liberal principles of modern, enlightened practice and procedure in the federal courts. The Court denied rehearing (App. B, p. 35), saying that "the intent to appeal from the judgment" could not reasonably be inferred from the notice of appeal. " * * * [P]laintiff's second notice of appeal cannot be said to indicate an intention to appeal from the original judgment of dismissal." Petitioner now brings this petition for a writ of certiorari.

Reasons for Granting the Writ.

The most important reason for granting the writ is that the decision of the Court of Appeals, in its various aspects and viewed as a whole, is contrary to the letter and spirit of the Federal Rules of Civil Procedure, to the Judicial Code, and, in general, to the basic principles of modern federal practice and procedure articulated by this Court as well as the Courts of Appeals of the various circuits, with which the decision appealed from is in conflict. The area of dispute involves amendment of pleadings and questions of appellate jurisdiction—subjects of importance to the practitioner in the federal courts and to this Court in its capacity as overseer of the administration of justice in the federal court system.

Summary of Argument.

This portion of the Petition treats with three aspects of the decision of the Court of Appeals: Part I considers the holding that petitioner's undesignated motion to vacate judgment to permit her to amend her complaint should be construed as motion under Rule 59(e) rather than Rule 60(b). Part II deals with the holding that petitioner's second notice of appeal, referring only to the denial of her motion to vacate, is insufficient to bring the judgment of dismissal before the Court of Appeals. Part III is addressed to the denial of petitioner's motion to amend her complaint. We submit that the decision of the Court of Appeals on these three issues indicates the need of review by this Court.

Argument.

I.

The decision of the Court of Appeals, whether viewed as a whole or, as is necessary for the purposes of this Petition, as a number of separate holdings, is in conflict with the most elemental principle of modern federal procedure—a principle recently articulated by this Court:

“The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.” *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

Recognizing that petitioner's motion to vacate the judgment of dismissal could have been filed under either Rule 59(e) or Rule 60(b) (App. B, p. 32), and realizing, as it

must, that petitioner was not bound to cite the particular rule relied upon,³ and noting that, if construed under Rule 59, both of petitioner's notices of appeal would be held ineffectual (but, if construed under Rule 60, effectual), yet the Court of Appeals decided that "the full context of the rules" dictated that the motion should be held to have been made under Rule 59.

The full context of the rules, we submit, in their most basic and essential principles, requires that, in construing pleadings, courts shall disregard harmless error (Rule 61; 28 U.S.C. § 2111), and that pleadings be construed "to secure the just, speedy, and inexpensive determination of every action" (Rule 1) and so "as to do substantial justice" (Rule 8(f)). The decision of the Court of Appeals, resulting as it does in a dismissal of the action purely on matters of pleading and without reaching the substance of petitioner's grievance, disregards, we submit, the purpose of pleading as articulated by this Court—"to facilitate a proper decision on the merits." *Conley v. Gibson*, *supra*.

In order to reach the merits, the Court of Appeals should have characterized petitioner's undesignated motion to vacate judgment under whatever applicable rule would have yielded that desirable result, be it Rule 59, Rule 60, or some other rule. But this larger and more significant principle is not resorted to by the Court of Appeals; rather, by framing the issue narrowly it rests its holding, in part, on its inability "to find any case which construed a motion to vacate a judgment made within 10 days of the judgment as a Rule 60(b) motion so that an appeal taken

³ Rule 7(b), which deals with the form of motions, does not require reference to a particular rule under which a motion is made. See 7 Moore, Federal Practice, ¶ 60.18 [8], p. 215 (2d ed. 1955), text at nn. 5-6; *Dunn v. J. P. Stevens & Co., Inc.*, 152 F. 2d 854, 855 (2d Cir. 1951).

before a disposition of the motion would be timely" (App. B, p. 32). But other Courts of Appeals, in harmony with the principle expressed by this Court in *Conley, supra*, and with awareness of the alternative results of characterizing a pleading one way or another, have uniformly ruled in favor of a characterization which permits a decision on the merits.

Thus Judge Frank in the Second Circuit held that a motion for a new trial⁴ should have been treated as a Rule 60(b) motion, thus rendering the plaintiff's appeal timely.⁵ Judge Clark of the same Circuit has said that defendant's motions to serve supplemental pleadings and to reargue plaintiff's motion for summary judgment earlier granted might, "in the interest of justice," be treated as Rule 60(b) motions if any of the grounds in that rule were met. *United States v. Wissahickon Tool Works, Inc.*, 200 F. 2d 936, 938 (2d Cir. 1952). Other courts have treated variously designated pleadings as if they were motions under Rule 60(b). Thus the Third Circuit has deemed a letter to the district court to be a motion under 60(b), *United States v. Backofen*, 176 F. 2d 263 (3d Cir. 1949); the Sixth Circuit has treated an independent action as a 60(b) motion, *Sebastiano v. United States*, 103 F. Supp. 278, aff'd, 195 F. 2d 184 (6th Cir. 1952); and a district court in the Ninth Circuit has treated a petition for a writ of coram nobis as a 60(b) motion. *In re Estate of Cremidas*, 14 F.R.D. 15 (D. Alaska, 1953).

And when it serves the end of deciding cases on their merits, courts will reject the Rule 60 characterization. In *Southern States Equipment Corp. v. USCO Power*

⁴ Rule 59 is captioned: "New Trials • • •"

⁵ *Tarkington v. United States Lines Co.*, 222 F. 2d 358 (2d Cir. 1955). The motion for a new trial was filed 21 days after judgment; the notice of appeal was filed 64 days after judgment, but within the 30-day appeal period after order denying the motion.

Equipment Corp., 209 F. 2d 111 (5th Cir. 1953), appellant filed a motion purporting to be under Rule 60(a), requesting the court to correct a "clerical error in the judgment." This error was corrected and the judgment ordered re-entered as corrected. Within 30 days of the second entry of judgment, but more than 30 days after the first, appellees filed notice of appeal from certain portions of the corrected judgment adverse to them. Appellant contended that, since a Rule 60 motion does not toll the running of time for appealing, appellees' notice, coming more than 30 days after original entry of the judgment appealed from, was untimely and the appeal should be dismissed. The court's disposition of the issue thus presented indicates, we submit, the proper approach in the instant case:

"Without dealing with the various ramifications and procedural complexities of the problem at length and considering it only in light of requirement of Rule 8(f), F.R.C.P., that 'all pleadings shall be so construed as to do substantial justice', we hold that appellant's motion filed June 19, 1952, while purporting to be a motion under Rule 60(a), will for present purposes be treated as a motion to alter or amend the judgment under Rule 59(e), and that appellant's motion to dismiss the cross-appeal is denied." 209 F. 2d at 116-117.⁶

⁶ See also *Hadden v. Rumsey Products, Inc.*, 196 F. 2d 92 (2d Cir. 1952), where the court had before it certain petitions attacking a final judgment (it apparently viewing these petitions as permitted under Rule 60(b)). These petitions, the court said, "may be treated as an independent action to obtain equitable relief" from the judgment; and this, notwithstanding that "Rule 3 states that an action is commenced by filing a complaint" and that Rule 4 contemplates that a summons shall be issued and served. The court noted that, despite technical requirements not

This basic principle in favor of liberality and against hypertechnicality, this recognition and effectuation of the primary purpose of pleadings as articulated by this Court in *Conley, supra*, is evident in cases involving matters other than the two particular rules involved in the instant case. Thus a petition for rehearing has been held equivalent to a motion for a new trial. *Fraser v. Doing*, 130 F. 2d 617 (D.C. Cir. 1942); *The Astorian*, 57 F. 2d 85, 87 (9th Cir. 1932). An acknowledgment of service of notice of appeal by the appellee, when filed, has been held an acceptable substitute for a regular notice of appeal which was not timely filed with the court. *Crump v. Hill*, 104 F. 2d 36 (5th Cir. 1939). In *Jordan v. United States District Court*, 233 F. 2d 362, 365 (D.C. Cir. 1956), a petition for a writ of mandamus filed with the appellate court was accepted as a sufficient notice of appeal. And an application made in the appellate court for leave to appeal in forma pauperis has been held "an unequivocal notification of intention to appeal" and sufficient to give the court jurisdiction. *Blunt v. United States*, 244 F. 2d 355, 359 (D.C. Cir. 1957); *Burdix v. United States*, 231 F. 2d 893, 894 (9th Cir. 1956); *Roth v. Bird*, 239 F. 2d 257 (5th Cir. 1956). And, finally, a motion for summary judgment (Rule 56(b)) was treated as a motion to dismiss the complaint for failure to state a claim upon which relief can be granted (Rule 12(c), mentioned by the court). *Dunn v. J. P. Stevens & Co.*, 192 F. 2d 854 (2d Cir. 1951).

One further area merits this Court's attention, and that is the apparent inconsistency of the Court of Appeals' reliance on the pleader's intention in one instance of characterizing a pleading, and the complete absence of mention of intention in another. In holding petitioner's

having been met, "it would be quite out of harmony with the spirit of Rule 1 to hold the appellees bound by the labels placed on the papers submitted to the district court." 196 F. 2d at 95.

second notice of appeal ineffectual, the Court relied chiefly on its determination that petitioner did not *intend* to appeal from the judgment by that notice (App. B, p. 35). Yet, in holding that the motion to vacate was a Rule 59 and not a Rule 60 motion, intention of the pleader is not even adverted to. Without expanding on this point unduly, it would seem clear that petitioner's intention, in light of her presumed intention that her two notices of appeal shall be effectual, was that her motion to vacate was filed under that rule which yielded the desired effect, namely Rule 60(b). An analysis of petitioner's intention along the lines pursued by the Court of Appeals with respect to the second notice of appeal, when applied to the undesignated motion, yields a result opposite to the conclusion of the Court. If intention is properly a criterion in characterizing pleadings, then, we submit, it should be applied even-handedly and consistently, rather than only in those aspects of the case where its application is prejudicial to petitioner. We do not argue in favor of resort to a pleader's intention—indeed, we argue that all such nebulous desiderata give way to the basic and essential principles of federal procedure. See Rules 8(f) and 61. But, if the criterion is to be applied, petitioner should be permitted to enjoy its benefits as well as being made to suffer its consequences.

Finally, it is interesting to note respondent's view of petitioner's motion to vacate (although it is expressed for her own purposes on appeal):

"In general, motions to vacate judgment in the District Court are governed by Rule 60 of the Federal Rules of Civil Procedure, and, although the appellant does not say so explicitly, it is apparent from her brief . . . that in the matter of her motion to vacate judgment she was relying on the 'other rea-

son' clause in paragraph (b) of Rule 60." Brief for Appellee, p. 10.

II.

In dismissing petitioner's appeal from the district court's judgment dismissing the action the Court of Appeals held that, since petitioner's second notice of appeal (App. C. p. 36) did not refer to the judgment, but rather to the denial of the post-judgment motions, such notice was insufficient to bring the judgment before the Court on review. This holding is in conflict with *United States v. Ellicott*, 223 U.S. 524 (1912); *Hoiness v. United States*, 335 U.S. 297 (1948); *United States v. Arizona*, 346 U.S. 907 (1953); and *State Farm Mutual Automobile Insurance Co. v. Palmer*, 350 U.S. 944 (1956), and represents a significant departure from a line of cases in the various Courts of Appeals. This conflict of decisions, as well as the importance of the issues of federal procedure here involved, calls for an exercise by this Court of its supervisory powers over the administration of justice in the federal courts.

In *United States v. Ellicott*, 223 U.S. 524, 538 (1912), this Court held that a notice of appeal referring to "the judgment rendered in the above entitled cause on the fourth day of January, 1909," which was the date of the order denying a motion for a new trial, was sufficient to raise on appeal the final judgment which had been entered May 18, 1908.

In *Hoiness v. United States*, 335 U.S. 297 (1948), this Court reversed a dismissal of appeal below which was based on a claimed deficiency in the notice of appeal. The only appealable order was the judgment of dismissal; the later order—the one specified in the notice of appeal—was not appealable. This Court held "that defect was of

such a technical nature that the Court of Appeals should have disregarded it in accordance with the policy expressed by Congress in R.S. § 954, 28 U.S.C. (1946 ed.) § 777." *Id.* at 300.⁷

See also *United States v. Arizona*, 346 U.S. 907 (1953), and *State Farm Mutual Automobile Insurance Co. v. Palmer*, 350 U.S. 944 (1956), where this Court in both instances granted certiorari and reversed, per curiam, dismissals of appeals below which were grounded on faulty notices of appeal.

The decision of the Court of Appeals is also in conflict with decisions in almost every other federal judicial circuit and, indeed, decisions in the First Circuit as well. In each of these cases a notice of appeal was held sufficient to raise the final judgment on appeal although defective in that it referred, not to the judgment, but to some other, non-appealable order.

In *Nolan v. Bailey*, 254 F. 2d 638, 639 (7th Cir. 1958), the notice of appeal was "from the order directing the jury to return a verdict against the plaintiffs." The notice of appeal in *Railway Express Agency, Inc., v. Ep-person*, 240 F. 2d 189, 192 (8th Cir. 1957), was "from the order overruling defendant's Motion for Judgment or in the Alternative for New Trial * * *." In *Creedon*

⁷ The repeal of section 777 does not affect the applicability of *Hoiness* to the instant case. The legislative history of the repealing Act expressly states that the reason for the repeal was that the subject matter of section 777 was "covered by Rules 1, 15, and 61 of the Federal Rules of Civil Procedure." H. Rep. No. 308, 8th Cong., 1st Sess., p. A 239. After referring to the repeal in *Hoiness*, this Court said: "And see Rules 1, 15, 61 and 81 * * *." 335 U.S. at 300-301, n. 6. See also 28 U.S.C.A., Rule 61, Notes of Advisory Committee on Rules. Furthermore, 28 U.S.C. § 2111, in language similar to that of Rule 61, directs appellate courts to "give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

v. *Loring*, 249 F. 2d 714 (1st Cir. 1957), and *United States v. Best*, 212 F. 2d 743, 744-745, n. (1st Cir. 1954); Judge Magruder of the First Circuit did not permit faulty notices of appeal to prejudice appellant's right to have the judgment below reviewed. In *Best* the notice was "from the order denying the motion for rehearing," while in *Creedon* it was "from order denying plaintiff's motion for new trial." In denying appellee's motion to dismiss the appeal because of this faulty notice in *Creedon*, Judge Magruder said: "It is founded on pure technicality."⁸

In its petition for rehearing, petitioner called this line of cases to the attention of the Court of Appeals. In denying rehearing the Court attempted to distinguish the cases, saying that "the second notice of appeal cannot be said to indicate an intention to appeal from the original judgment of dismissal" (App. B, p. 35). But clearly such a narrow and qualified statement of the issue in an attempt to distinguish cases that are, in principle, indistinguishable is error. Whether the intent to appeal is garnered from one notice or another, or, for that matter, from any pleading before the court, is, we submit, immaterial. What is significant is that the intent to appeal from the judgment of dismissal is, in fact, manifested to the appellate court by the actions taken and papers filed by the petitioner.

In the *Hoiness* case, *supra*, this Court said:

"It seems to us hypertechnical to say that the *appeal papers* did not bring the sole issue of the case

⁸ See also *Conway v. Pennsylvania Greyhound Lines, Inc.*, 243 F. 2d 39, 40, n. 2 (D.C. Cir. 1957); *Donovan v. Esso Shipping Co.*, 259 F. 2d 65, 68 (3d Cir. 1958); *United States v. Stromberg*, 227 F. 2d 903, 904 (5th Cir. 1955); *Holz v. Smullon*, 277 F. 2d 58, 61 (7th Cir. 1960); and *Cheney v. Moler*, 285 F. 2d 116, 117-118 (10th Cir. 1960). And see *Gunther v. E. I. DuPont De Nemours & Co.*, 255 F. 2d 710, 717 (4th Cir. 1958); and *Trivette v. N.Y.L.I.C.*, 270 F. 2d 198 (6th Cir. 1959).

fairly before the Court of Appeals." 355 U.S. at 301.
(Emphasis supplied.)

The court in *Atlantic Coast Line R. Co. v. Mims*, 199 F. 2d 582, 583 (5th Cir. 1952), said:

"While we agree with appellees that an appeal will not lie from an order overruling a motion for new trial, we agree with appellant that, though the order appealed from was misnamed, it clearly enough appears *from the record as a whole* that the intent was to appeal from the judgment, and that that intent should be given effect." (Emphasis supplied.)

The Fifth Circuit in *United States v. Stromberg, supra*, n. 8, refused to dismiss an appeal although the notice referred only to denial of appellant's motions under Rules 52(b) and 59(a), saying that, "where it is obvious that the *overriding intent* was effectively to appeal, we are justified in treating the appeal as from the final judgment." 227 F. 2d at 904. (Emphasis supplied.) And in *Sun-Lite Awning Corp. v. E. J. Conklin Aviation Corp.*, 176 F. 2d 344 (4th Cir. 1949), the court looked beyond the four corners of a faulty notice of appeal (which referred only to denial of a motion for rehearing) and gathered an intent to appeal from the final judgment from the Statement of Points to be relied upon on appeal as filed by appellant.

In other cases Courts of Appeals have taken jurisdiction of appeals where no formal notice was filed as required by Rule 73. In *Crump v. Hill*, 104 F. 2d 36 (5th Cir. 1939), the appellant filed appellee's acknowledgment of service of notice of appeal, her entry of appearance and the designation of the record on appeal, but failed to file a timely notice of appeal. Appellee accordingly moved to dismiss the appeal. In denying the motion

the court held that appellant's actions were in complete accordance with the spirit of the rules and in substantial compliance with their letter. Chief Judge Hutcheson further stated:

"* * * [I]t would we think be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by the Rule [73] is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights. * * * Indeed, it would we think be an exhibition of unsound reasoning and a clear abuse of judicial discretion for us to start the Rule off barnacled with the rigid and rigorous holding appellee's motion seeks." 104 F. 2d at 38.

See also *Jordan v. United States District Court*, 233 F. 2d 362 (D.C. Cir. 1956), where a petition for a writ of mandamus filed with the appellate court was accepted as a sufficient notice of appeal, and *Blunt v. United States*, 244 F. 2d 355 (D.C. Cir. 1957), where an application made in the appellate court for leave to appeal in forma pauperis was held "an unequivocal notification of intention to appeal" and sufficient to confer appellate jurisdiction. See also *Burdix v. United States*, 231 F. 2d 893 (9th Cir. 1956), and *Roth v. Bird*, 239 F. 2d 257 (5th Cir. 1956).

Applying these precedents to the instant case, there can be no doubt that the intention to appeal from the district court's dismissal of the action is manifest from the record in the case. Indeed, this case is a stronger one on this issue of intention than some of those cited, since here petitioner filed a notice of appeal (her first notice) specifically referring to the judgment of the district court dismissing the action. That such notice is held, whether

correctly or erroneously, to have been nugatory because of premature filing does not detract from its force as a clear manifestation of petitioner's intention to appeal from the judgment. The "appeal papers," the "record as a whole" and, indeed, the Statement of Points to be Relied Upon on Appeal (App. D) are eloquent of an overriding intention which the Court of Appeals disregards. In viewing the second notice of appeal *in vacuo*, as it were, the Court has rendered a decision based upon a hypertechnical view of federal procedural requirements, in conflict with the decision of this Court and those of other federal judicial circuits, and, in the words of Chief Judge Hutcheson, a decision "harking back to the formalistic rigorism of an earlier and outmoded time" and constituting "a travesty upon justice."

Finally, it would be well to note that in no wise has the respondent been misled or prejudiced by petitioner's actions in appealing this case. Nowhere in her brief before the Court of Appeals does the respondent even raise the issue whether the judgment of the district court is properly before the Court of Appeals. And, if that Court felt compelled to resolve the issue by reference to strict and technical doctrines of appellate jurisdiction, it is again, we submit, out of line with basic principles. "The rule of strict construction does not apply to the acquiring of jurisdiction by an appellate court. On the contrary, the steps taken for an appeal are to be liberally construed as appears from the cases cited * * *." *Cutting v. Bulterdick*, 178 F. 2d 774, 776 (9th Cir. 1949).

III.

In affirming the orders of the district court entered on January 26, 1961, denying petitioner's motions to vacate the judgment dismissing her complaint and to amend her

complaint, the Court of Appeals has, in effect, held (1) that the proffered amendment set forth a new cause of action, "an independent matter" which was not set out in the original complaint (see App. B, p. 34), and (2) that the district judge's denial of petitioner's motion to amend her complaint did not constitute an abuse of discretion. Both holdings, we submit, are in conflict with the decisions of this Court and those of a number of Courts of Appeals, as well as in violation of the basic principles of federal procedure as articulated in the cases and the Federal Rules of Civil Procedure.

Before considering the precedents it would be well to focus upon the facts pertinent to this aspect of the case. Petitioner's complaint alleges an agreement whereunder she was to provide for the care of her mother and was to receive, in turn, upon the death of her father, her intestate share of his estate—two-thirds of approximately \$60,000. Petitioner further alleges full performance of her part of the agreement by furnishing and paying for the care of her mother (Complaint, par. 3, R.A. 3), and prays for judgment in the amount of \$40,000.

The proffered amendment to the complaint (R.A. 11-12) repeats the first paragraph of the original complaint (R.A. 2), claims a jury trial, and prays for judgment in the amount of \$12,500, representing "monies paid by the plaintiff for and on behalf of the defendant and for services rendered for and on behalf of the defendant * * * (R.A. 11-12).

Thus the only new matter contained in the amendment is a specification of the dollar amount claimed to be owed

* References to the "defendant" are clearly intended to read "decedent." Although respondent bases an argument upon this obvious slip (Brief for Appellee, pp. 12-13), the Court of Appeals did not refer to it as a ground for its holding and, apparently, took this minor discrepancy for what it was.

petitioner for her services and expenditures and a prayer for judgment in that amount and for jury trial. Obviously, all the amendment sought to accomplish was the addition of a count in quantum meruit to what had been a straight action for damages for breach of contract. To hold that damages based on quantum meruit cannot be obtained in an action for breach of contract, to deny permission to add such a count to the complaint, and to base these rulings on the characterization of the quantum meruit count as a new action or "independent matter" is manifest error and in conflict with the decisions of this Court, the Courts of Appeals of other circuits, and the spirit of liberality in pleading and procedure as embodied in the Federal Rules. Petitioner argues, *first*, that the quantum meruit count could have been properly recovered upon under the original complaint and that an amendment was therefore not necessary; and, *second*, that, if amendment is necessary or desirable, a refusal to grant leave to amend constitutes an abuse of judicial discretion.

(1)

In *Friederichsen v. Renard*, 247 U.S. 207 (1918), the plaintiff, claiming to have been defrauded in an exchange of lands, brought suit in the district court to annul the contract and deed and for incidental damages. The court, finding that plaintiff had affirmed the contract by acts of ownership, transferred the case to the law side as an action for damages for deceit. The bill was appropriately amended to conform to a law action, adding a prayer for a judgment in damages, but effecting no substantial change in the allegations of fraud. Meanwhile the statute of limitations had expired and, on this ground, the district court ordered a directed verdict in favor of the defendants. The Court of Appeals for the Eighth Circuit

affirmed on the ground that the amended complaint set forth "a new action at law, directly opposed to the theory stated in the bill," and therefore the amended complaint did not relate back to the commencement of the action. 231 Fed. 882, 885. This Court granted certiorari and reversed the decisions below, stating that it considered it settled—

... that the conversion of a suit in equity into an action at law or *vice versa* is not alone sufficient to constitute the beginning of a new action and that with respect to the statute of limitations it is a mere incident in the progress of the original case." 247 U.S. at 210.

But more in point and particularly apropos to the instant case is the following from 247 U.S. at 210:

"But the allegations of fraud in the two papers are the same in substance, and practically the same in form, the only substantial difference between them being that the prayer for relief in the bill is for mutual return of lands, with incidental damages, while, in the amended petition, it is for damages alone. *The cause of action is the wrong done, not the measure of compensation for it, or the character of the relief sought, and, considered as a matter of substance, the change in the statement of that wrong in the amended petition cannot in any just sense be considered a new or different cause of action.*" (Emphasis supplied.)

One of the grounds relied upon by the Court of Appeals in the instant case in characterizing the quantum meruit count as "an independent matter" from the original claim for damages for breach of contract is that it proceeded "upon a different theory" (App. B, p. 34).

This was one of the grounds relied upon by the Court of Appeals in *Friederichsen*, *supra*, and the reversal of that case by this Court is eloquent of the invalidity of the "different theory" test. This is confirmed by *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 67-68 (1933), where Mr. Justice Cardozo, speaking for this Court, held that a change in legal theory was no longer accepted as the test in determining whether a claim is a new action or whether it constitutes part of a pending action.

In *Hutches v. Renfro*, 200 F. 2d 337, 341 (5th Cir. 1952), the court held that, where the facts alleged in a complaint entitle the plaintiff to certain relief, but such relief is not clearly prayed for, "it is the duty of the court to grant the relief to which the plaintiff is entitled, irrespective of the prayer for relief." And even where a defective theory of relief is pursued in the complaint, the court was "in no doubt that plaintiff is entitled to the relief to which the proven facts entitle him, even though his own legal theory of relief may have been unsound." 200 F. 2d at 340.

• The Federal Rules of Civil Procedure require the same result. Rule 54(c) provides, in part:

"Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

That recovery on a quantum meruit theory is possible in a situation such as that presented in the instant case is certainly clear as a matter of Massachusetts law, which, although not binding on this aspect of the case, is further evidence of the generally accepted rules which were dis-

regarded by the courts below. Thus in *Shopneck v. Rosenbloom*, 32 Mass. 81, 84 (1950), cited in both briefs before the Court of Appeals, the court states:

"The 'rule is that if a plaintiff has paid money, conveyed property, or rendered services under an oral agreement within the statute of frauds, which agreement the defendant wholly refuses to perform, he can recover the money paid, or the value of the property conveyed, or of the services rendered; in that case there is a total failure of consideration and the plaintiff can recover the value of any benefit inuring to the defendant as a result of the transaction.'"

Finally, it is anomalous to note that the holding of the Court of Appeals that a count in quantum meruit is "an independent matter" from an action for breach of contract is stricter and more technical than required even by the old rules of common-law pleading under the forms of action. Thus in *Parker v. Macomber*, 17 R.I. 674, 24 Atl. 464, 16 L.R.A. 858 (1892), a case somewhat similar on its facts to the instant case, it was held that a declaration in an action of assumpsit not containing a count in quantum meruit was nevertheless sufficient as a basis for recovering the value of services performed by the plaintiff pursuant to a contract although damages for breach could not, as such, be recovered under the facts of the case. See also *Norris v. School District in Windsor*, 12 Me. 293, 298 (1835). In 1 Chitty on Pleading 353* (16th Am. ed. 1876), it appears:

"Under an *indebitatus* count the plaintiff may recover what may be due him, although no specific price or sum was agreed upon; and therefore it has been observed that the *quantum meruit* and *quantum valebant* counts are in no case necessary * * *."

It is clear, in view of the precedents cited, that the Court of Appeals has acted in violation of the "accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 44-45 (1957). This action by the court below, in violation of the mandate of this Court as well as basic, general principles of construction of pleadings in the federal courts, indicates the need of review by this Court.

(2)

Even assuming, however, that the complaint should have been amended, the denial of permission to amend constitutes abuse of discretion. Rule 15(a) requires that leave to amend "be freely given when justice so requires." Again and again the various Courts of Appeals have made it clear that Rule 15(a) places a duty on the courts to allow a litigant to have his day in court by permitting him to correct pleading in some respect deficient. Thus in *Dowdy v. Procter & Gamble Mfg. Co.*, 267 F. 2d 827 (5th Cir. 1959), Chief Judge Hutcheson said, assuming that the complaint failed to state a claim, yet the district judge was in error for dismissing the complaint without granting leave to amend. See also *Pioche Mines Consol., Inc., v. Fidelity-Philadelphia Trust Co.*, 206 F. 2d 336 (9th Cir. 1953): "In view of the liberal spirit as regards amendments displayed in Rule 15 F.R.C.P., we think Pioche should have been given opportunity by amendment to cure if it could the shortcomings of the counterclaim indicated by the judge." *Id.* at 337; *Dunn v. J. P. Stevens & Co.*, 192 F. 2d 854, 856 (2d Cir. 1951); *Peterson Steels, Inc., v. Seidmon*, 188 F. 2d 193, 196 (7th Cir. 1951).

In *Blake v. Clyde Porcelain Steel Corp.*, 7 F.R.D. 768 (D.C. S.D. N.Y. 1944), plaintiff filed a motion to amend his complaint, which made claim for moneys due but not paid under an employment contract. The proposed amendment, as in the instant case, sought to add a count in quantum meruit. In permitting amendment the district judge said: "Rule 15(a) states that 'leave' to amend 'shall be freely given when justice so requires', and if plaintiff has a valid cause of action upon any theory, he should be afforded opportunity to assert it." 7 F.R.D. at 769.

Thus Rule 15(a) is a vital, living part of the Federal Rules—one whose significance to litigants the courts have recognized. In the instant case, however, there is no opinion by the district court explaining his denial of leave to amend; and, on this basis, the Court of Appeals finds "nothing presented by the record to show the circumstances which were before the district court for its consideration in ruling on the motions" and cannot say, therefore, that the district court abused its discretion. Nowhere is there a mention of Rule 15(a) or a discussion of petitioner's rights under that rule. Even before the advent of the Federal Rules, this Court had "fixed the limits of amendment with increasing liberality." *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 68 (1933). The courts below have, we submit, acted in disregard of the letter and the spirit of Rule 15(a), and this Court should review this important question of pleading in the federal courts.

If extenuating circumstances are necessary before an amendment may be allowed—and we vigorously deny that such is the law—then such circumstances were clearly presented in this case and should have been noticed by the Court of Appeals. From the memorandum of decision of the district judge (R.A. 7, esp. 8-9) as well as the briefs submitted by both parties it should have been clear that,

in framing her complaint, the petitioner relied on a decision of the First Circuit which stood unreversed, *Cleaves v. Kenney*, 63 F. 2d 682 (1933). Petitioner could assume that a district judge in the Circuit would consider himself bound by that decision (see pp. 12-14 of Brief for Appellant). When, however, the district judge refused to follow the earlier precedent rendered by his superior tribunal and dismissed the complaint, is it not in order that petitioner be given leave to amend? Denial of leave, and affirmation of such denial, are, we submit, clear abuses of judicial discretion, calling for an exercise by this Court of its supervisory powers over the administration of justice in the federal courts.

Conclusion.

In conclusion, in view of the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to the United States Court of Appeals for the First Circuit, to the end that the appeal may be heard on its merits.

Respectfully submitted,
MILTON BORDWIN

Dated, Boston, Massachusetts,
November 10, 1961.

Appendix A.**Statutes and Rules Involved.**

United States Code, Title 28, sec. 777 (repealed June 25, 1948, 62 Stat. 992, c. 646, sec. 39):

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

United States Code, Title 28, sec. 1291:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ."

United States Code, Title 28, sec. 2111:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Federal Rules of Civil Procedure.**Rule 1:**

“* * * [These rules] shall be construed to secure the just, speedy, and inexpensive determination of every action.”

Rule 8(f):

“All pleadings shall be so construed as to do substantial justice.”

Rule 15(a), (c):

(a) “* * * and leave [to amend] shall be freely given when justice so requires.”

(c) “Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.”

Rule 54(c):

“* * * Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.”

Rule 59(e):

“A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.”

Rule 60(b):

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment."

Rule 61:

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Rule 73(b):

"The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. * * *"

Appendix B.

Opinion of the Court of Appeals.

June 26, 1961.

HARTIGAN, *Circuit Judge*. Plaintiff in the instant case appeals from a judgment of the United States District Court for the District of Massachusetts entered following the allowance of defendant's motion to dismiss and from orders of the district court denying plaintiff's motion to vacate judgment and to amend her complaint.

The action involves an oral agreement between the plaintiff, Lenore Foman, and her father, Wilbur W. Davis, the decedent, by which decedent agreed to refrain from making a will and to die intestate and plaintiff agreed to assume and pay all expenses for the care and maintenance of decedent's wife who was also the plaintiff's mother. Under the alleged agreement, plaintiff would receive a child's share according to the laws of intestacy of the Commonwealth of Massachusetts. Plaintiff alleged the making of this oral agreement and her subsequent fulfillment of her obligations under it. Plaintiff alleged that her father, in breach of the agreement, executed a Last Will and Testament, duly allowed in the Probate Court for the County of Middlesex, by which he devised and bequeathed virtually all of his estate to defendant, who was his second wife, and bequeathed nothing to the plaintiff. This suit was brought against Elvira A. Davis, decedent's widow and executrix.

Defendant filed an answer which denied the making of such agreement and set up various defenses, among them, the bar of the statute of frauds. Defendant on the same day also filed a motion to dismiss the action.

The district judge granted the motion to dismiss on the ground that the action on the oral contract was barred by

the Massachusetts statute of frauds and judgment was entered on December 19, 1960.

On December 20, 1960 plaintiff filed a motion to vacate the order granting defendant's motion to dismiss and the judgment thereon in order to permit plaintiff to file a motion to amend her complaint by adding a second cause of action for monies paid and services rendered for and on behalf of the decedent. Plaintiff at the same time filed a motion to so amend and attached the proposed amendment.

On January 17, 1961 plaintiff filed a notice of appeal from the judgment entered December 19, 1960. Subsequently on January 23, 1961 the district court held a hearing on plaintiff's motions of December 20, 1960 and denied each motion. A notice of appeal from the denial of these motions was filed by plaintiff on January 26, 1961.

Preliminarily there is a question of what is properly before us on appeal. A motion under F.R.Civ.P. 59(e) to alter or amend the judgment terminates the running of the time for taking an appeal. See Rule 73. However, a motion under Rule 60(b) does not affect the finality of a judgment or suspend its operation. The plaintiff's motion seeking the vacating of the dismissal order and judgment does not designate the rule under which it is brought. If the motion to vacate the dismissal order and judgment thereon is construed as one under Rule 59(e), then the appeal taken on January 17, 1961 from the judgment entered on December 19, 1960 was premature, since the running of the time for appeal is terminated by a timely motion under Rule 59(e) and the motion had not yet been disposed of by the district court. See Rule 73; 7 Moore, Federal Practice ¶73.09 [6] (2d ed. 1955). On the other hand, if said motion is construed as an effective Rule 60(b) motion, then the finality of the judgment would not have been suspended

and the January 17, 1961 appeal would be properly before us.

Although the cases do authorize the vacating of a judgment under both rules in the proper circumstances, *Klaprott v. United States*, 335 U. S. 601, 615 (1948), judgment modified 336 U. S. 942 (1949); *Patapoff v. Vollstedt's Inc.*, 267 F.2d 863 (9 Cir. 1959); *Kelly v. Delaware River Joint Commission*, 187 F.2d 93 (3 Cir.), cert. denied, 342 U. S. 812 (1951); 6 Moore, Federal Practice ¶59.12 [1] (2d ed. 1953), we believe that the full context of the rules dictates that resort should be made to the procedure under Rule 59 if time for applying for such motions has not expired. Cf. *Chicago & N. W. Ry. Co. v. Davenport*, 95 F.Supp. 469 (S.D.Iowa 1951) which is criticized in 7 Moore, Federal Practice ¶60.27 [2], p. 306 n.23 (2d ed. 1955). We are unable to find any case which construed a motion to vacate a judgment made within 10 days of the judgment as a Rule 60(b) motion so that an appeal taken before a disposition of the motion would be timely. Plaintiff's second notice of appeal could have specified the judgment of December 19, 1960. Lacking such reference, we believe that the appeal insofar as the judgment is concerned must be dismissed. See *Aberlin v. Zisman*, 244 F.2d 620 (1 Cir.), cert. denied 355 U. S. 857 (1957).

In regard to the contention that the district court abused its discretion in not allowing plaintiff's motions to vacate the judgment and amend her complaint, there is nothing presented by the record to show the circumstances which were before the district court for its consideration in ruling on the motions. We, therefore, cannot say that the district court abused its discretion.

Judgment will be entered dismissing the appeal insofar as it is taken from the district court's judgment entered December 19, 1960; and affirming the orders of the district court entered January 26, 1961.

Opinion of the Court of Appeals.

ON PETITION FOR REHEARING.

August 17, 1967.

HARTIGAN; *Circuit Judge*. Plaintiff's petition for rehearing seeks to read into our opinion much broader principles than are justified or were intended. In holding that the second notice of appeal did not bring before us the propriety of the judgment of dismissal we did not intend to overrule or qualify our earlier cases, of which *Creedon v. Loring*, 249 F.2d 714 (1 Cir. 1957), cited by plaintiff, is an example. In *Creedon v. Loring*, following the entry of judgment for the defendants upon verdicts of the jury, plaintiffs filed a motion for a new trial. After that motion had been denied, plaintiffs appealed "from the order . . . denying plaintiff's motion for a new trial." The defendants moved to dismiss the appeal as not having been taken from the final judgment. We denied this motion as "founded on a pure technicality." We pointed out, however, that plaintiffs were limited in their appeal to those alleged errors "on which the motion for the new trial was based; it is not open to appellant to urge other alleged errors at the trial which might have been presented on an appeal from the original judgment itself." *Id.* at 717.

Similarly, other circuits have recognized that an appeal from the denial of a new trial may carry back to the judgment in which the errors sought to be rectified by the motion occurred. See, e.g., *Cheney v. Moler*, 285 F.2d 116, 118 (10 Cir. 1960); *Holz v. Smullan*, 277 F.2d 58 (7 Cir. 1960). In *Donovan v. Esso Shipping Company*, 259 F.2d 65 (3 Cir. 1958), cert. denied, 359 U.S. 907 (1959), the court said: "A defective notice of appeal should not warrant dismissal for want of jurisdiction where the intention to appeal from a specific judgment may be reasonably

inferred from the text of the notice and where the defect has not materially misled the appellee. . . . For example, an appeal from the denial of a new trial may under exceptional circumstances be treated as an inept attempt to appeal from the judgment which preceded that denial." However, the court went on to say: "While mere technical omissions in the notice of appeal should not deprive appellant of his right of review, where the appeal is taken specifically only from one part of the judgment the appellate court has no jurisdiction to review the portion not appealed from." *Id.* at 68. The notice of appeal in that case specifically sought review of the dismissal of all causes of action "other than that cause of complaint on maintenance and cure." The court held it was without jurisdiction to consider the maintenance and cure question. All of these cases, however, indicate that the determinative element is one of intent, i.e., whether the intent to appeal from the judgment may be reasonably inferred from the notice of appeal.

In the case at bar, following the original judgment of dismissal, plaintiff did not move for review or reconsideration, comparable to a motion for a new trial, but moved for leave to amend the complaint by adding a self-styled "Second Cause of Action," by which she sought substantially less damages, upon a different theory, predicated on the assumption that the dismissal of the first cause of action was in fact correct. This was, by hypothesis, an independent matter. Any error involved in the denial of this motion for leave to amend could relate back in no way to errors which entered into and infected the original judgment. Also, militating against plaintiff's position that the second notice of appeal was intended to be an appeal from the original judgment of dismissal is the factor that plaintiff plainly thought she appealed from that judgment by her first notice of appeal. Now that that

notice of appeal has been held premature, plaintiff contends that the second notice of appeal is sufficient. We believe, however, that under the principles of the above-cited cases, plaintiff's second notice of appeal cannot be said to indicate an intention to appeal from the original judgment of dismissal.

If plaintiff's second appeal was in her mind intended to encompass the old cause of action rather than, or in addition to, the proposed new one, it was deficient not technically, but in substance.

The petition for rehearing is denied.

Appendix C.

First Notice of Appeal.

[Title and Caption omitted.]

Notice is hereby given that Lenore Foman, plaintiff above named, hereby appeals to the United States Court of Appeals for the First Circuit from the final Judgment entered in this action on December 19th, 1960.

GUTERMAN, HORVITZ & RUBIN

HENRY N. SILK

Attorney for the Appellant, Lenore
Foman

50 Congress Street
Boston, Massachusetts

Filed: Jan. 17, 1961

Second Notice of Appeal.

[Title and caption omitted.]

Notice is hereby given that Lenore Foman, plaintiff above named, hereby appeals to the United States Court of Appeals for the First Circuit from the orders entered in this action on January 23, 1961 denying (a) Plaintiff's Motion to Vacate Judgment on Defendant's Motion to Dismiss and (b) Plaintiff's Motion to Amend Her Complaint.

GUTERMAN, HORVITZ & RUBIN

HENRY N. SILK,

Attorney for the Appellant Lenore
Foman

50 Congress Street
Boston, Massachusetts

Filed: Jan. 26, 1961

Appendix D.

Statement of Points to be Relied Upon by the Plaintiff-Appellant, Lenore Foman.

[Title and caption omitted.]

Now comes the plaintiff-appellant, Lenore Foman (hereinafter called the plaintiff), by her attorney and states that the points upon which she intends to rely in the herein appeal are as follows:

1. The complaint of the plaintiff wherein she seeks recovery for the breach of an oral agreement of the defendant's testator to die intestate sets forth an agreement which is valid and enforceable under the law of the Commonwealth of Massachusetts.

2. Neither Section 1, clause 4 nor Section 5 of Chapter 259 of the General Laws of Massachusetts apply to an oral agreement by the testator to die intestate.

3. The Massachusetts law applicable to the plaintiff's cause of action, as interpreted by the Court of Appeals of this circuit in *Cleaves v. Kenny*, 63 F. 2d 682, remains unchanged, and such decision has neither been challenged, weakened nor overruled by any subsequent decision of this circuit, the Supreme Judicial Court of Massachusetts or by statute.

4. The plaintiff had a right to assume that a District Court of the United States would follow the decisions of the Court of Appeals for its circuit, irrespective of what the District Court might think the law should be in a particular matter, and to assume further that if the District Court chose not to follow the Court of Appeals, leave to amend would be freely given to the plaintiff especially where the facts alleged by her set forth alternative causes of action.

5. The facts set forth in the plaintiff's complaint establish a cause of action upon the theory either of an express contract or on a quantum meruit recognizable under the law of Massachusetts, and the failure to grant leave to amend at the time that the defendant's Motion To Dismiss was allowed was error.

6. The basic and comprehensive principle upon which the Federal Rules of Civil Procedure is founded is that controversies should be decided upon their merits.

7. Full fealty and not merely lip service is accorded by the federal courts to the language of Rule 15(a) of the Federal Rules of Civil Procedure that permission is to be freely given to amend pleadings when justice so requires.

8. The District Court erred in denying permission to the plaintiff to vacate the judgment on the defendant's Motion To Dismiss and in not permitting the plaintiff to amend her complaint where such permission was necessary to further justice and particularly where the District Court chose not to follow a decision of the Court of Appeals upon which the plaintiff had a right to rely.

9. The denial by the District Court of the plaintiff's motions was contrary to the spirit of liberality of the Federal Rules of Civil Procedure that amendments to pleadings should be freely allowed particularly where the refusal to permit such amendments will work a grave injustice upon the plaintiff and in no manner will prejudice the defendant.

By her attorney,

HENRY N. SILK

GUTERMAN, HORVITZ & RUBIN

50 Congress Street

Boston, Massachusetts

[Certificate of Service dated March 3, 1961, omitted in printing.]